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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 29, 30) has not yet been reported.

JURISDICTION

The order of the District Court sustaining the demurrer to the joint indictment was entered June 21, 1938 (R. 30). The appeal to this Court was applied for and allowed on July 20, 1938 (R. 31–32). The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682)

and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). An order was entered by this Court on October 10, 1938, noting probable jurisdiction.[1]

QUESTION PRESENTED

The sole question presented on this appeal is whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellees are to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

STATUTE INVOLVED

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), are printed in the Appendix, infra, pp. 32–33.

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[1] The order of October 10, 1938, reads as follows: "In these cases (the order being applicable also to two other cases, Nos. 287 and 295) probable jurisdiction is noted. Further consideration of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits." The appellees' motion to dismiss was based solely upon one of the two grounds included in their statement opposing jurisdiction filed August 3, 1938. Inasmuch as the order of October 10, 1938, noting probable jurisdiction, covers both grounds which appellees urged against jurisdiction and therefore also the sole ground urged in respect to the motion to dismiss, it is assumed that the only matter deferred to the hearing of this case on the merits is the motion to affirm. Since this motion is based upon a single ground going to the merits, separate consideration is deemed unnecessary.

STATEMENT

On March 6, 1937, the grand jury impaneled for and in session during the December 1936 term of the United States District Court for the Eastern District of Pennsylvania presented an indictment (R. 2–24), in twenty-six counts, charging appellees with soliciting and receiving rebates and concessions in violation of Section 1 of the Elkins Act. Each count is identical in substance and, omitting certain details and formal allegations, alleges the following material facts obtaining during the period covered by the indictment:

(1) The Pennsylvania Railroad Company, in conjunction with other common carriers by railroad, operated joint through routes for the transportation of property from certain points in California, through the Eastern District of Pennsylvania, to Manhattan Produce Yards in New Jersey.

(2) These common carriers published tariffs naming rates for the transportation of carload shipments of grapes over the above routes, and specifying those rates to be 173 cents per 100 pounds, at a minimum carload weight of 20,000 pounds.

(3) These common carriers on a certain date did transport for appellee, Midstate Horticultural Company, Inc., as consignor, a carload shipment of grapes from one of the California points named,

over their joint through route as specified, to Manhattan Produce Yards, where the property was delivered to the consignee and the published freight charges collected from such appellee.

The last paragraph of each count is identical in every respect wth the excepton of the amount of the rebate and the California point of origin of the shipment. The last paragraph of Count 1 (R. 3) is here quoted:

> That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

The rebates and concessions charged by the several counts of the indictment total $10,391.16.

In a bill of particulars ordered by the court, the Government stated (R. 27–28):

> (1. Question.) Where was the crime committed?
>
> 1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Railroad Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate Horticultural Company in the City of New York, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

The defendants demurred to the indictment (R. 28, 29) upon the ground, among others, that (R. 29):

> 3. The indictment does not allege any facts which give this court jurisdiction over defendants in this matter; in that it is alleged in Counts 1 to 26, inclusive, of the indictment, that on May 15, 1935, defendants did knowingly solicit, accept, and receive and cause to be solicited, accepted, and received from the Pennsylvania Railroad

> Company certain rebates in respect to the transportation of certain shipments, but it is not stated in the indictment that the rebate was received within the jurisdiction of this court, or in what jurisdiction payment was received, and it further appears in all of the Counts of the Indictment that the transportation of the various shipments had terminated more than two years prior to the date of receipt of payment of the alleged rebate.

The District Court sustained the demurrer (R. 30, 31), its opinion (R. 29, 30) concluding:

> If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court * * *.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In sustaining the demurrer to the indictment.

(2) In holding and adjudging that jurisdiction of the offenses charged in the indictment does not lie in the District Court of the United States for the Eastern District of Pennsylvania.

(3) In failing to construe Section 1 of the Elkins Act, the statute upon which the indictment is founded, as fixing jurisdiction of the offenses charged in the indictment in the District Court of

the United States for the Eastern District of Pennsylvania.

(4) In holding and adjudging that jurisdiction of the offenses charged in the indictment lies solely in the District Court of the United States for the Southern District of New York.

SUMMARY OF ARGUMENT

The offense charged by the indictment, as defined by the Elkins Act, does not consist merely of the act of receiving a rebate. The Elkins Act primarily forbids the accomplishment thereby of a specified result, namely, the obtaining of transportation in any district of the United States at less than tariff rates. It was the purpose of Congress, in so defining the offense, to make it constitutionally cognizable in any district "through which the transportation may have been conducted." A contrary construction of the Elkins Act will, by defeating this purpose, make an effective enforcement of the statute impossible. For the achievement of the result forbidden by the Act two events necessarily must occur: (1) transportation in some district of the United States and (2) the grant and acceptance of a rebate with respect thereto. Whether the rebate precedes the transportation or the transportation precedes the rebate, the forbidden result is nevertheless produced. The demurrer by admitting the occurrence of these two events establishes one indisputable fact—that appellees have suc-

ceeded in obtaining transportation in the Eastern District of Pennsylvania at less than tariff rates. This being true, that district is the district where the offense was committed within the meaning of the Sixth Amendment.[2] The physical presence of the offender in the district where the crime is deemed to have been committed is unnecessary.

ARGUMENT

I

THE OFFENSE CHARGED BY THE INDICTMENT, AS DEFINED BY THE ELKINS ACT, DOES NOT CONSIST MERELY OF THE ACT OF RECEIVING A REBATE. THE ELKINS ACT PRIMARILY FORBIDS THE ACCOMPLISHMENT THEREBY OF A SPECIFIED RESULT, NAMELY, THE OBTAINING OF TRANSPORTATION IN ANY DISTRICT OF THE UNITED STATES AT LESS THAN TARIFF RATES

The indictment charges appellees with receiving a rebate and concession "whereby * * * property was transported * * * through the East-

[2] Whenever in this brief it is stated that the offense "was committed" in the Eastern District of Pennsylvania, or an equivalent statement is made, it is not intended thereby to say that the offense as defined is capable of being "committed" only in a district wherein some part of the transportation may have been conducted. The offense may also be "committed" in the district wherein the shipper receives the rebate, although not a district of transportation, for, while not constituting the substantive offense, the receipt of the rebate is an essential element thereof, and within the meaning of the Sixth Amendment a crime may be said to have been "committed" wherever any of its essential elements are committed. *Hyde* v. *United States*, 225 U. S. 347.

ern District of Pennsylvania and within the jurisdiction of this Court * * * at a less rate and charge than that named and provided in the schedules and tariffs * * *." It sufficiently charges the actual transportation of property in interstate commerce through the Eastern District of Pennsylvania and the receipt by appellees *thereafter* of a rebate and concession "with respect thereto." It is not alleged that prior to or at the time of the physical movement of the property through the Eastern District of Pennsylvania there existed an intent or agreement to receive the rebate and concession, nor is the place where the actual payment of the rebate was effected alleged. From the Government's bill of particulars it appears that a check in payment of the alleged rebates was transferred in the City of New York (R. 27, 28).[3] The question is whether this indictment sufficiently charges the commission of an offense in the Eastern District of Pennsylvania within the meaning of the Sixth Amendment to the Constitution, which guarantees appellees the right to a trial in the "State and district wherein the crime shall have been committed."

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[3] The bill of particulars (R. 28) recites this fact as having been stated at the bar of the court below by counsel for the Pennsylvania Railroad, defendant in a companion case which was jointly heard with this case in the court below, and which is now before this Court on a similar appeal. *United States* v. *Pennsylvania Railroad Company*, No. 287, October Term, 1938.

The reasoning upon which the court below based its decision answering this question negatively and sustaining the demurrer to the indictment does not appear of record. Its opinion recites merely the bare legal conclusion that "if any violation of the law occurred as alleged, the case should be tried in New York" (R. 30). The demurrer was grounded upon the fact that "it is not stated in the indictment that the rebate was received within the jurisdiction of this court * * * and it further appears * * * that the transportation of the various shipments had terminated more than two years prior to the date of receipt of payment of the alleged rebate" (R. 28, 29).

Apparently the lower court's holding and appellees' contention is that under the allegations of this indictment the crime charged was "committed" at the place where the actual receipt of the rebate occurred, and could not have been "committed" in the Eastern District of Pennsylvania or elsewhere. As we understand the argument of counsel below, it is conceded that a crime is committed and jurisdiction may lie in the district of transportation notwithstanding the place of the payment of the rebate is outside that district, where the payment of the rebate precedes the act of transportation in point of time (*Armour Packing Company* v. *United States*, 209 U. S. 56) or even where the payment of the rebate follows the act of transportation but is pursuant to an understanding or

intent at the time of transportation. *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25, 29 (C. C. A. 2d), certiorari denied, 245 U. S. 645. Apparently it is thought that when the rebate follows the transportation and is not pursuant to an intent or agreement existing at the time of the transportation the offense is committed only at the place where the payment of the rebate is effected, and the plain jurisdictional provisions of the statute are to be disregarded either as in these circumstances inapplicable or as unconstitutional because in violation of the Sixth Amendment.

The error of this argument and of the holding below springs from a failure to recognize the true nature of the offense defined by the Elkins Act and charged by the indictment. The offense so defined and charged does not consist merely of the appellees' act of receiving a rebate (wherever it may have been received in contemplation of law). The offense so charged and defined consists primarily of the accomplishment of a forbidden result, namely, the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate. *Armour Packing Company* v. *United States*, *supra*, pp. 74, 75.

This being true, the place of the commission of the offense in the constitutional sense (as will be shown in Part II of this Argument), is the district wherein that forbidden result may have been produced—in this case, the Eastern District of Pennsylvania.

To the extent that the definition of an offense governs the determination of the place where the offense may be said to have been "committed," two types of crimes, as defined by the common law or by statute, are in contrast: first, those which forbid merely the conscious act of the wrong-doer and, second, those which forbid the accomplishment of a specified result. The contrast has been aptly stated by Judge Learned Hand in *Daesche* v. *United States,* 250 Fed. 566, 570 (C. C. A. 2d):

> In short, if the crime, as homicide, be defined to include some consequences of the act, it may be argued and has been generally decided (*U. S.* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14932; *U. S.* v. *McGill,* 4 Dall. 426, Fed. Cas. No. 15676) that the crime takes place only where the consequences occur. The crime is the consequence when produced by human agency whether near or far. But where the crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place only where he acts.

Broadly speaking, of course, it is the purpose of all the prohibitions of the criminal law to forbid results deemed harmful to society, but the limitless variety of human affairs prevents the adoption of any one formula in the attempt to achieve these ultimate results. In some, and perhaps in most instances, the criminal law prescribes merely the conscious human act, without regard to whether or

not that act produces consequences which society fears will ordinarily flow therefrom. In other instances, however, the law forbids primarily the achievement of the consequence itself. In such case, the human act which produced the forbidden consequence may or may not be separately defined as an offense.[4] There are many instances of the type of crime so defined as primarily to forbid a specified result, familiar examples being the offenses of murder and manslaughter, *United States* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14932; *United States* v. *McGill,* 4 Dall. 426, Fed. Cas. No. 15676; *Commonwealth* v. *Macloon,* 101 Mass. 1; *Tyler* v. *People,* 8 Mich. 320, and that of obtaining property under false pretenses, *People* v. *Adams,* 3 Denio 190, approved 1 Comstock (N. Y.) 173. Into this class of offenses falls also the offense charged by the indictment herein and defined by the Elkins Act.

A careful consideration of the language of the Elkins Act leaves no doubt but that Congress intended by its enactment to define as an offense against the United States not merely the payment

[4] For some purposes, the distinction between a "human act" and its "consequences" may not be so simply stated. Cf. W. W. Cook, "*Act, Intention and Motive* in Criminal Law," 26 Yale L. J. 645 (1917); Salmond, *Jurisprudence,* 7th ed., Sec. 128 (1924). It is believed, however, that for the purpose here of differentiating between appellees' and the Government's conception of the offense charged by the indictment, as defined by the Elkins Act, the distinction as stated is sufficiently apparent.

or receipt of a rebate in itself, but primarily the achievement of a specified result, namely, that of obtaining transportation in any district of the United States at less than tariff rate. This conclusion is strongly suggested by the significant fact that insofar as the Elkins Act is concerned a shipper's act of receiving a rebate or concession is—in itself and irrespective of consequence—not prohibited.[5]

The Elkins Act encompasses other offenses than the one charged by the indictment in this case. *Armour Packing Company* v. *United States, supra,* page 74. An analysis of the Act discloses that it denounces at least two distinct classes of offenses:

(a) granting, giving, accepting, receiving rebates, concessions, or discriminations, *whereby property shall be transported in interstate commerce at less than tariff rates;*

(b) granting, giving, accepting, receiving rebates, concessions, or discriminations, *whereby any other advantage is given or discrimination is practiced.*

It will be seen that the receipt of a rebate by a shipper is not defined by the Act as a substantive offense in itself, but is denounced only insofar as it may be the means of effecting either of two forbidden results, the obtaining of (1) transportation

[5] It is separately made an offense for a *carrier* willfully to fail "strictly to observe" its published tariffs. (Appendix, *infra*, pp. 32–33.)

in interstate commerce at less than tariff rates, or (2) any other advantage or discrimination.

Although all of the offenses thus classified must be "in respect to the transportation of property in interstate commerce," Congress did not consider this language broad enough for the definition of the offense of the first class (the one charged in the indictment) and added the *"broad and sweeping 'whereby' clause."* *Hocking Valley R. Co.* v. *United States,* 210 Fed. 735 (C. C. A. 6th), certiorari denied 234 U. S. 757. This clause, reading "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff," is the key to the legislative definition of the offense charged by the indictment in this case. The result by these terms forbidden is the essence of the offense. The terms "rebates, concessions, or discriminations" are merely descriptive of the means by which the forbidden result might be achieved. The legislative denunciation of this forbidden result is further emphasized and effectuated by the inclusion of the phrase "by any device whatever," which significantly modifies not the words "rebates, concessions, or discriminations" but the "whereby" clause itself. This phrase reveals the "objective" purpose of Congress, for by the use of these words Congress freed the prosecution from the requirement of showing moral turpitude or fraudulent intent on the part of

the human actor involved[6] and provided that "any means by which transportation by a concession from the established rate was had is sufficient to work a conviction." *Armour Packing Company* v. *United States, supra,* page 85. Nevertheless, the device is not the offense denounced (*Grand Rapids I. Ry. Co.* v. *United States,* 212 Fed. 577, 582 (C. C. A. 6th)) nor is it even essential that the device be set out in the indictment. *Armour Packing Co.* v. *United States, supra,* pages 83, 84.

Confirmation of the intention of Congress to so define the offense as to make it constitutionally cognizable in any district through which the transportation should be had, irrespective of the place where the rebate or concession might be made, is found in that sentence of the Act which provides: "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted." In the enactment of this provision it was the purpose of Congress not merely to designate the district in which the offense might be prosecuted, but by that designation to clarify the nature of the offense it had already defined. It cannot be supposed that Congress, in the

[6] As was necessary, prior to the enactment of the Elkins Act, under the Act of March 2, 1889, 25 Stat. 857, Act to Regulate Commerce, Section 10 (now Section 10 of the Interstate Commerce Act). *Armour Packing Company* v. *United States, supra,* page 70.

enactment of this provision, was oblivious to the provisions of the Sixth Amendment. The Act as a whole indicates that it had a further purpose in so providing. That purpose was not merely to designate the district in which the case might be prosecuted, because Congress knew it could not arbitrarily select a district or districts in defiance of the Constitution. It had already, in the charging part of the Act, linked the act of rebating inseparably with the act of transportation. It intended by that portion of the Act, and by the section providing for the place of prosecution, to stamp the offense as primarily forbidding the accomplishment of a forbidden result, namely, the obtaining of transportation, in any district in the United States, at less than lawful rate. The rule is that a statute ought to be so construed that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant. *Montclair* v. *Ramsdall,* 107 U. S. 147, 152; *D. Ginsberg & Sons* v. *Popkin,* 285 U. S. 204.

That such is the construction to be placed upon such a designation of the place of punishment by Congress is expressly decided in a leading case, decided under the Act to Regulate Commerce, *Davis et al.* v. *United States,* 104 Fed. 136 (C. C. A. 6th). This case was decided on October 2, 1900, only about two years before the consideration and enactment by Congress of the Elkins Act of 1903, and while we find nothing in the legislative history of the Elkins Act in confirmation, it is not unreason-

able to believe that the drafters of the Act, many of whom were attorneys learned in the law of interstate commerce, and that Congress in its enactment, had the opinion of that court in mind.

The *Davis* case involved a prosecution under paragraph 3 of Section 10 of the Act to Regulate Commerce (Act of March 2, 1889; c. 382, 25 Stat. 857) for the fraud therein denounced of obtaining transportation of property at less than "regular rates" by false billing and through similar devices. The statute provided that the prosecution could be had only "within the district in which such offense was committed." No attempt had been made in the Act itself to make the transportation an essential element of the offense. The Circuit Court of Appeals for the Sixth Circuit held that this provision precluded the Government from prosecuting the defendant elsewhere than in the district wherein the fraudulent act or practice may have been committed and was not sufficient to confer jurisdiction in a district wherein merely transportation had been obtained.[7]

Mr. Justice Day, then Circuit Judge, called attention to the fact that the failure of Congress to provide for the punishment in any district through which the transportation passed was significant, and showed that it was not the purpose of Congress to make the transportation an element of the crime.

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[7] This case was distinguished by this Court in reaching an opposite result under the Elkins Act. *Armour Packing Company* v. *United States*, *supra*, page 75.

He said on page 139 of the reported case, referring to the "venue" provision:

> This provision shows the intention of Congress to punish a crime which is committed in a district wherein jurisdiction is given for its punishment.
>
> * * * * *
>
> If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress in passing this act and providing for the place of trial and punishment in a single district evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper, and the delivery for transportation takes place. It is said this part of the statute providing for the place of trial is nothing more than an enactment of the constitutional provision which requires that in criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, in the district where the crime was committed. We are unable to see the purpose which Congress could have had in this undertaking to reenact this constitutional provision. Nothing can be added to the force of the statute by repeating a provision which no statute can ignore, and a constitutional requirement with which Congress must be assumed to have been familiar.

Thus that court declared that the fact that Congress omitted to designate any district as a place of punishment other than that where the "offense was committed" was significant of its intention not to characterize the crime as one which might be committed in more than one district. We submit that the express particularity with which Congress has provided for the places of trial in the Elkins Act, later enacted, is equally significant of its purpose to forbid the accomplished result rather than the act of rebating alone and to create jurisdiction in any district where the transportation occurred.

In the case of *Armour Packing Company* v. *United States, supra,* after a careful analysis of the Elkins Act as a whole, this Court concluded (p. 74): "It is at least certain that these sections construed together, make an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it is had."

The Government's interpretation of the Elkins Act is demanded by the cardinal rule of construction, always adhered to by this Court, that a statute will be given a reasonable construction with a view to effecting the objects and purposes of Congress.

II

IN DEFINING THE OFFENSE SO AS PRIMARILY TO FORBID THE ACCOMPLISHMENT OF A RESULT, IT WAS THE INTENTION OF CONGRESS TO MAKE THE OFFENSE CONSTITUTIONALLY COGNIZABLE IN ANY DISTRICT THROUGH WHICH THE TRANSPORTATION MAY HAVE BEEN CONDUCTED. A CONTRARY CONSTRUCTION OF THE ELKINS ACT WILL, BY DEFEATING THIS PURPOSE, MAKE AN EFFECTIVE ENFORCEMENT OF THE STATUTE IMPOSSIBLE

By defining the offense so as primarily to forbid the achievement of a result rather than merely to forbid a human act alone, Congress made the offense constitutionally cognizable in any district through which the transportation may have been conducted. The purpose of Congress in so doing was to make the Elkins Act an effective rather than an impotent weapon against the evil of rebating and discrimination. Congress sought to relieve the prosecution from embarrassment because of uncertainty or lack of knowledge as to the district in which the concession might be granted or in which the rebate might actually be paid. A carrier's books might disclose an unlawful payment but the time and place of actual payment may be unascertainable. And where a negotiable instrument is employed to effect a rebate, the determination of the time and place of the "payment of the rebate" becomes a hazardous undertaking for the prosecutor, even though he may know at what place the

instrument was passed, requiring him to venture into the maze of the law merchant and the uncertain law of the relation between banker and depositor. For the place of the actual passing of a negotiable instrument is not necessarily the place of "payment" or transfer of assets which constitutes the actual "payment of a rebate." This determination often depends upon considerations so vague and difficult of proof as the intention of the parties to the transaction—for example, as to whether it is the intent of the parties that the bank of deposit is the purchaser of the instrument or the collection agent of the depositor. *Burton* v. *United States,* 196 U. S. 283, 301. In the case just cited the Government suffered a reversal of a conviction on jurisdictional grounds because the prosecutor was held to have erred in his judgment as to where "payment" of compensation (by check) to the accused had actually been effected (for services rendered by the accused while a member of the Senate of the United States in relation to a proceeding in which the United States was interested, contrary to statute).

In *Salas* v. *United States,* 234 Fed. 842, 845-847 (C. C. A. 2d), jurisdiction in the Southern District of New York was defeated, where the defendant, in furtherance of an alleged conspiracy to defraud the United States, accepted drafts at Colon in the Republic of Panama payable in the Southern District of New York. The defendant was able to

show that he had forwarded these drafts to banks in Winnipeg, Canada, and Indianapolis, Indiana, and had at these places received credit for them. The court held that the payment of the drafts in the Southern District of New York was not to the accused but to the forwarding banks, the Government having been unable to show an agreement that the forwarding banks were but collection agents of the accused.

Congress, in so defining the offense created by the Elkins Act as to make it constitutionally cognizable in any district through which the transportation may have been conducted, undoubtedly had in mind not only the difficulty and often impossibility of determining in what district the rebate might actually be paid, but also the even more obvious danger of permitting offenders to escape punishment entirely by effecting the payment of the rebate in Mexico or Canada, or on the high seas, or otherwise beyond the jurisdiction of the United States.

The court below having learned that the check in payment of the alleged rebates had been transferred in the City of New York,* concluded (R. 30): "If any violation of the law occurred as alleged, the case should be tried in New York." Had counsel stated that the check had been transferred in the City of Montreal, Canada, the court below, adhering to its interpretation of the law, would have been forced to conclude: "If any violation of

* See Note No. 3, *supra*, p. 9.

the law occurred as alleged, the case is not subject to the jurisdiction of the United States."

Under appellees' construction of the Elkins Act, according to which under the circumstances of this case the offense is "committed" only where the rebate is paid, where would jurisdiction lie in the instance where the carrier's books disclose a proper transportation charge to the shipper, but the offense consists merely in a wilful failure to collect these charges?

Appellees thus urge a construction which would permit the ingenuity of shippers and carriers to defeat completely the beneficial purposes of the Elkins Act, which is a statute so drafted as, in the opinion of Congress, to "*exhaust the power of legislation* to prevent rebates and discriminations through criminal prosecutions."[9]

We submit that appellees' construction of the Elkins Act is untenable and that the statute should be so construed and enforced as to promote its manifest policy and extirpate the evils against which it was directed. Applying this rule of construction and giving effect to all the words and sentences of the statute the only reasonable interpretation of the Elkins Act is that it does not merely forbid the payment of the rebate as an act in itself, but that primarily it forbids the achievement by that means

[9] Report from the Committee on Interstate and Foreign Commerce, Feb. 12, 1903, House Report No. 3765, 57th Congress, 2d Session.

of a specified result, namely, the obtaining of transportation in any district of the United States at less than tariff rate. "Otherwise it might be said that Congress enacted a very salutary law which in many cases could not be enforced." *Perara* v. *United States,* 221 Fed. 213, 317 (C. C. A. 8th). By the construction urged by the Government full effect is given to the obvious intent of Congress to make the offense cognizable in "any district through which the transportation may have been conducted."

III

THE OFFENSE CHARGED BY THE INDICTMENT AND DEFINED BY THE ELKINS ACT WAS COMMITTED WITHIN THE MEANING OF THE SIXTH AMENDMENT IN EVERY DISTRICT THROUGH WHICH THE TRANSPORTATION MAY HAVE BEEN CONDUCTED

For the achievement of the result forbidden by the Elkins Act two events necessarily must occur. There must be (1) actual transportation of property in some district of the United States in interstate commerce, and (2) the grant or acceptance of a rebate from the published tariff rates in respect to such transportation. When these two events have taken place, the forbidden result has been accomplished. The forbidden result has been produced in every district "through which the transportation may have been conducted." "The act concerns itself with preventing concessions and rebates with respect to interstate transportation of

property, and not with carriers, shippers, their agents, or anyone else, unless and until their acts result in the accomplishment of that which the statute forbids." *Spencer Kellogg & Sons* v. *United States,* 20 F. (2d) 459, 461 (C. C. A. 2d); certiorari denied, 275 U. S. 566.

It can make no difference whether the payment of the rebate precedes the actual physical movement of the property or follows it. In both instances the forbidden result is effectively accomplished. In every district through which the transportation may have been conducted transportation at less than tariff rates has been obtained.

The two events whose occurrence is necessary for the achievement of the offense are admitted by the demurrer, which thereby establishes one fact indisputably—*appellees have succeeded in obtaining transportation at less than tariff rates in the Eastern District of Pennsylvania.* The Eastern District of Pennsylvania—since it is a district in which the forbidden result occurred—is the district of the commission of the offense within the meaning of the Sixth Amendment.

Appellees do not see beyond the physical act of a check passing across a desk from one human hand to another, at a particular moment in time and at a particular point in space (beyond the Eastern District of Pennsylvania). At that point, in their view, the crime was "committed"—and to them the verb "commit" creates a wall about that point in space beyond which the eye of the law cannot see.

But the verb "commit," as used in the law of crimes, is a more capable word, and must be so, if criminal jurisprudence is to be applied pragmatically to the infinite variety of human relationships. It is not so restrictive as to encompass only the physical act of the wrongdoer, but encompasses also the consequences of the wrongdoer's act, if the legislature has included the consequences within the definition of the crime. As Mr. Justice Holmes said for this Court in *United States* v. *Holte,* 236 U. S. 140, 155, "'commit' means no more than bring about." It results that in the case of crimes such as the one here involved, which forbid not the human act alone, but primarily the consequences thereof, the offense within the meaning of the Sixth Amendment is "committed" not only in the district where the forbidden act is done but also in the district wherein the forbidden result is produced. It further results that in such cases the physical presence of the offender in the latter district is not essential. The right secured by the Sixth Amendment, this Court said *In re Palliser,* 136 U. S. 257, 265, "is not a right to be tried in the district where the accused resides, or even in the district in which he is personally, at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" And this Court said again in *Armour Packing Company* v. *United States, supra,* at page 76, that "The constitutional requirement is as to the locality of the offense and not the personal presence of the offender."

Within the past century the increasing com
plexities of modern life have required the relaxa
tion of ancient territorial restrictions on crimina
jurisdiction, and the tendency of the courts ha
been to apply more elastic jurisdictional principle
to modern crime situations.[10] Illustrative of th
trend toward a more realistic approach to th
problem are the "extra-territorial" statute
adopted in many of the States, typical of which
a statute of the State of New York (Baldwin
Cons. Laws of New York (1938), Art. 174, Se
1930 (5)), which provides:

> The following persons are liable to pu
> ishment within the State: * * * A perso
> who, being out of the State and with inte
> to cause within it a result contrary to th
> laws of this State does an act which in i
> natural and usual course results in an a
> or effect contrary to its laws.

An interesting example of an assertion of th
type of jurisdiction is found in the case of *Hanks*
The State, 13 Texas Appeals 289, which upheld
conviction under a Texas statute (Article 4
Texas Penal Code, Act of July 28, 1876, p. 5

[10] Berge, "*Criminal Jurisdiction and the Territorial Pr*
ciple," 30 Michigan Law Review, 239 (1931). Over fi
years ago Francis Wharton wrote: "The great discover
of recent days, by which the obstacles of space are s
mounted, call for a reconsideration of our old conceptions
criminal jurisdiction." Wharton, "*Conflict of Crimi*
Laws," 1 Cr. L. Mag. 689 (1880).

under a chapter head entitled "Forgery of Land Titles, Etc.," and provided:

> Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to arrest and punish all persons offending against its provision, whether within or without this State.

In that case all of the acts constituting the forgery were committed in Louisiana. The court, in its opinion, said:

> We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in Article 454, *supra,* her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation, within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under circumstances as we are considering, that other State would have no interest in punishing it, and would rarely, if ever, do so. *When this forgery was committed in Louisiana, eo instanti a crime was committed against, and injury done to, the State of Texas, because it affected title to*

lands within her sovereignty. [Italics supplied.]

This Court, in *Armour Packing Company* v. *United States, supra,* found that violations of the Elkins Act may constitutionally be tried in the district of transportation, although the physical act of rebating took place in another district. There the rebate preceded the transportation. And appellees concede, as we understand their argument below, that where the rebate follows the transportation a similar conclusion is demanded, provided an intent or agreement with regard to the rebate existed at the time of the transportation. But absence of intent at the time of the physical movement of the property does not alter the fact that when a rebate has thereafter been received with respect to such transportation, the result forbidden by the Elkins Act has been effectively achieved. Intent is important only to the extent that the offender must have knowingly done some act whereby transportation in some district of the United States at less than tariff rate has been obtained. *Armour Packing Company* v. *United States, supra,* page 85. The indictment here sufficiently charges that appellees, by receiving the rebate, knowingly had accomplished this forbidden result—had obtained, in the Eastern District of Pennsylvania, transportation at less than tariff rate. The indictment thus sufficiently alleges the commission of an offense in the Eastern District of Pennsylvania within the meaning of the Elkins Act.

CONCLUSION

It is respectfully submitted that the order of the court below sustaining the demurrer to the joint indictment should be reversed.

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DECEMBER 1938.

APPENDIX

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* Sec. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to

said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. * * *

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